

2013 WL 8749324 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Raymond RAMSOWER, Plaintiff,

v.

PRUDENTIAL ANNUITIES LIFE ASSURANCE CORPORATION, a Connecticut corporation
formerly known as American Skandia Life Assurance Corporation, United Planners **Financial**
Services, an Arizona limited partnership, Ronald Wacik, and Does 1-100, inclusive, Defendant.

No. 3:13-cv-02485-H-WMC.
November 8, 2013.

**Defendant Prudential Annuities Assurance Corporation's Memorandum
of Points and Authorities in Support of Motion to Dismiss**

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Judge: Marilyn L. Huff.

[Fed. R. Civ. P. 12(b)(6)]

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MEMORANDUM OF POINT AND AUTHORITIES

I. INTRODUCTION

The gravamen of Raymond Ramsower's ("Plaintiff's") claim is his dissatisfaction with the **financial** planning and investment advice given to him by defendant, Ronald Wacik ("Wacik"), an investment advisor and registered representative with defendant United Planners **Financial** Services ("United Planners"), an independent broker-dealer.

Plaintiff's claim is made looking in the review mirror at the past 13 years. As part of a **financial** plan, and pursuant to the investment advice provided by Wacik and United Planners, Plaintiff purchased a Prudential deferred annuity in May of 2000. Plaintiff affirmed in his Application he had received a copy of the Prospectus and understood that annuity payments when based on the investment experience of Sub-accounts were variable and not guaranteed as to a dollar amount. The death benefits were outlined in the annuity contract and also the Prospectus provided at the time of sale. From time to time, Plaintiff reallocated his investments in the Sub-account and received confirmations of those transactions. He regularly received quarterly statements that provided him with his contract performance and information regarding the value of his death benefits.

May of 2000 (when Plaintiff purchased the annuity), was, in retrospect, the beginning of a dramatic decline in stock market that lasted for many years. Virtually no one in America with retirement savings was untouched. It is therefore of no surprise that Plaintiff's Sub-account investments mirrored the down market.

Plaintiff rebalanced to fixed accounts in 2002. But in 2004, reallocated again to all variable investments. In 2008, America experienced an almost unprecedented economic meltdown. As Plaintiff's annuity value was invested in the market, he -- along with most of America -- again suffered loss.

Mr. Ramsower chose to have his annuity mature on August 1, 2010, shortly after he turned 89 years old. Upon maturity, the annuity value as of the annuity date is converted into a payment stream, the terms of which are reflected in a Claim Settlement Certificate. As the Claim Settlement Certificate provides, Plaintiff began to receive and he will continue to receive for the rest of his life monthly annuity payments of \$608.40. If Plaintiff dies within 10 years of the annuity date, the payments will be paid for the balance of the 10-year period in equal shares to the designated beneficiaries, who are his children Joan, Steven and Mark.

Plaintiff does not allege Prudential breached any terms of the annuity, failed to properly annuitize the policy or failed to pay the policy benefits. Nor does Plaintiff allege any other improper action undertaken by Prudential itself. Instead, Plaintiff's complaint is based entirely on the performance of the underlying investments in the annuity between 2000-2010 and the ultimate amount of the death benefits after the annuity's 10th year anniversary. Plaintiff alleges Wacik, in one-on-one in person meetings in early 2000, provided an unrealistically positive view of the benefits of investing in an annuity. Plaintiff chose to purchase the Prudential annuity in May 2000, and, as the market bubble burst, the account value had dropped by nearly half before the close of 2001. Plaintiff cannot go "Back to the Future"¹ and change the course of his investment choices. Certainly not now in 2013, when all the facts regarding the variable nature of the Sub-accounts and the death benefits were available to him in 2000. Based on these facts, Plaintiff's Complaint is time barred.

Even if Plaintiff's Complaint were timely, he fails to state any viable claims against Prudential:

1. Plaintiff's claims against Prudential for Misrepresentation, Fraud, and Unfair Business practices must fail, as he does not, and cannot, allege any improper independent acts by Prudential. Theories of vicarious liability and respondeat superior are inapplicable here, where Wacik, a United Planners employee, allegedly made misrepresentations outside the annuity contract and outside the course and scope of his independent agency relationship with Prudential.

2. Plaintiff's claims for Breach of Fiduciary Duty, Negligence, and violations of the Consumers Legal Remedy Act also fail in that they are not legally recognized causes of action that can be brought by Plaintiff against Prudential as an insurer.

3. Plaintiff's claims for Common Counts, Rescission, Tort of Another, and under the **Elder Abuse** Act are remedies (unavailable to Plaintiff) and not recognized separate causes of action that can be brought against Prudential.

4. Plaintiff's prayer for treble damages under the **Elder Abuse** statutes and for punitive damages must also fail as they too are based solely on the acts of Wacik and United Planners and not the conduct of Prudential.

Plaintiff cannot go back in time or into the future to cure the defects of his Complaint. Prudential's motion to dismissed should be granted without leave to amend.

II. RELEVANT BACKGROUND

In May of 2000, Plaintiff purchased an annuity issued by Prudential. (Compl. ¶ 14.) Plaintiff purchased the annuity through United Planners after attending a presentation given by his investment advisor, Wacik, and several meetings in Wacik's office. (Compl. ¶ 12-13.) Wacik held himself out to be an expert in **financial** planning. (Compl. ¶ 13.) During an "in person meeting at Wacik's office" in April or May 2000, Wacik misrepresented that the annuity's death benefit at the time of the purchase would apply to the annuity payments he now receives. (Compl. ¶ 20.) Plaintiff further alleges Wacik selected the underlying investments for the annuity, and that Wacik advised Plaintiff, at one of these in person meetings, that "growth in the subject policy was guaranteed." (Compl. ¶ 21.) Plaintiff purchased the annuity for \$120,879.26, and when the contract matured in 2010, the account had a value of \$67,083.20. (Compl. ¶¶ 14-17.) Had Plaintiff known that Wacik "did not have Plaintiff's best interest in mind he would not have followed Wacik's advice." (Compl. ¶ 22.)

Plaintiff asserts causes of action against all defendants, including Prudential, for: (1) Breach of Fiduciary Duty; (2) Professional Negligence of a **Financial** Advisor; (3) Negligent Omissions Causing Injury; (4) Negligent Misrepresentation of Material Facts; (5) Common Count - Money Had and Received; (6) Rescission; (7) Tort of Another Claim for Attorney's Fees; (8) Unfair Business Practices under [Business & Professions Code Section 17200](#) ("UCL"); (9) California Consumer Legal Remedies Act ("CLRA"); (10) Statutory **Elder Abuse**; and (11) Fraud.

Each of Plaintiff's claims are time barred. Prudential issued the annuity in May 2000. (Compl. ¶16). The value of the account had declined under \$70,000 before the close of 2001. Plaintiff's suit was not filed until August 21, 2013, 13 years later. Plaintiff's Complaint far exceeds the three year statute of limitations for fraud, negligence, and claims under the CLRA; and the four year limitations period for tort and contract damages including statutory **elder abuse** and rescission the UCL, and breach of fiduciary duty. Even if timely, each cause of action fails on its merits as a matter of law. Prudential's motion to dismiss should be sustained without leave to amend.

III. LEGAL STANDARD

Each cause of action fails to state a claim against Prudential both on the face of each claim and on the affirmative defense of the statute of limitations. A complaint that fails to state a claim upon which relief can be granted should be dismissed. [Fed. R. Civ. P. 12\(b\)\(6\)](#); [North Star Int'l v. Arizona Corp. Comm'n](#), 720 F.2d 578, 581 (9th Cir. 1983). Dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. [Balistrer v. Pacifica Police Dep't](#), 901 F.2d 696, 699 (9th Cir. 1990). "[A] wholly conclusory statement of claim" does not "survive a motion to dismiss" under [Rule 12\(b\)\(6\)](#) simply because the pleadings "le[ave] open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery." [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 561-62 (2007) (abrogating [Conley v. Gibson](#), 355 U.S. 41 (1957).) Rather, a complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Id.* at 570. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." [Ashcroft v. Iqbal](#), 129 S. Ct. 1937, 1949 (2009). Finally, a motion to dismiss on the grounds of the affirmative defense of the statute of limitations is appropriate where the defect is patent on the face of the

complaint. See *Jablon v. Dean Wittier & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (if the running of the statute of limitations is apparent on the face of the complaint, the defense may be raised by a motion to dismiss).

IV. ARGUMENT

A. Plaintiff's Complaint Is Time Barred

1. Plaintiff possessed all the facts needed to bring his claims against Prudential when the annuity was issued 13 years ago - each of Plaintiff's causes of action is barred by the statute of limitations

Stripped to their essence, each of Plaintiff's claims arise from one of two complaints: (1) lack of knowledge that the variable investments in the annuity Sub-accounts were not guaranteed; and (2) operation of the annuity death benefits. There is nothing about these complaints that was unknown at the time the annuity was issued on May 2, 2000. (Compl. ¶ 14.)

a) The statutes ran on Plaintiff's claims in 2003 and 2004

Plaintiff did not file his Complaint until August 21, 2013, over 13 years after purchase of the annuity, outside the three and four year statute of limitations applicable to each cause of action - three years for negligence and fraud (*County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 302 (2006)); three years for claims under the CLRA (*Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 644 (2009)); four years for claims under the UCL (*Id.*); four years for breach of fiduciary duty (*Thompson v. Canyon*, 198 Cal. App. 4th 594, 606 (2011)); four years for breach written contract remedy of rescission (Cal. Code Civ. Proc. 337) and four years for **financial elder abuse** (Cal. Welf. & Inst. Code 15657.7) These claims are subject to dismissal under Rule 12(b)(6). *Frame v. City of Arlington* (5th Cir. 2011) 657 F.3d 215, 239-240; *Von Saher v. Norton Simon Museum of Art at Pasadena* (9th Cir. 2010) 592 F.3d 954, 969 (time barred actions fail to state a claim under Rule 12(b)(6).)

“Generally, a cause of action accrues and the statute of limitation begins to run when a suit may be maintained. Ordinarily this is when the wrongful act is done and the obligation or the liability arises. . . .” (*Atlantic Richfield Co.*, *supra*, at 334, citing, *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815.) “But the limitations period does not begin to run until the plaintiff discovers or should have discovered the cause of action.” *Id.* “The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her.” (*Id.*, citing, *Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d 1103, 1109 (a plaintiff must go find the facts; she cannot wait for the facts to find her). “In order to invoke this special defense to the statute of limitation, the plaintiff must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.” *Saliter v. Pierce Bros. Mortuaries*, 81 Cal.App. 3d 292, 296 (1978).

b) The Prudential documents given to Plaintiff in 2000 provided all the facts necessary for his claims.

Plaintiff alleges the purchase and terms of the annuity, but does not attach the policy or the Application and Prospectus provided at the time of sale. While Plaintiff alleges the value of his annuity at various times including losses in the annuity, he does not provide the annuity statements showing the account values alleged. On a motion to dismiss, the Court may consider a document whose “contents are alleged in a complaint and whose authenticity no party questions,” even where that document is not attached to the complaint itself. *Molina v. L.A. County*, 58 Fed. Appx. 311, 313 (9th Cir. 2003). Similarly, courts can take judicial notice of facts outside the complaint where judicial notice is appropriate. *Coto Settlement v. Eisenberg* 593 F.3d 1031, 1038 (9th Cir. 2010); see also, *Nghiem v. United States Dep't of Veteran Affairs*, 451 F. Supp. 2d 599, 603 (S.D.N.Y. 2006) (when determining the sufficiency of plaintiff[']s claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in [the] complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents either in plaintiff[']s possession or of which plaintiff[] had knowledge

and relied in bringing suit.) Plaintiff alleges the annuity contract and documents were signed at Wacik's office on or around May 2, 2000, but failed to attach those documents to the Complaint. (Compl. ¶ 14.) Prudential attaches as exhibits the annuity documents alleged by Plaintiff and incorporated by reference in the Complaint.

Here, if the terms of the Prudential annuity were other than represented by United Planners and Wacik, his independent broker-dealer and investment advisor, there is no better notice of the alleged misrepresentations than the actual contract and the Prospectus provided to him at the time of the sale.

The annuity documents are unambiguous that allocation of purchase payments (premium) in the Sub-accounts is not guaranteed. The Application provides in all capital, bold text directly above Plaintiff's signature:

I/WE HAVE ALSO RECEIVED A COPY OF THE PROSPECTUS AND I/WE UNDERSTAND THAT:
(A) ANNUITY PAYMENTS OR SURRENDER VALUES, WHEN BASED ON THE INVESTMENT EXPERIENCE OF THE SEPARATE ACCOUNT, ARE VARIABLE AND NOT GUARANTEED AS TO A DOLLAR AMOUNT.

(See Exhibit A.)

The Prospectus similarly provides in bold italics:

Values and benefits based on allocations to the Sub-accounts will vary with the investment performance of the underlying mutual funds or fund portfolios, as applicable. We do not guarantee the investment results of any Sub-account. Your Account Value allocated to the Sub-accounts may increase or decrease. You bear the entire investment risk.

(Exhibit B at p. 45)

The annuity itself in bold capitals provides on the first and the last page:

IN THE ACCUMULATION PERIOD ANY PAYMENTS AND VALUES PROVIDED UNDER THE VARIABLE INVESTMENT OPTIONS ARE BASED ON THEIR INVESTMENT PERFORMANCE AND ARE, THEREFORE, NOT GUARANTEED. PLEASE REFER TO THE SECTION ENTITLED "ACCOUNT VALUE IN THE SUB-ACCOUNTS" FOR A MORE COMPLETE EXPLANATION.

(Exhibit C at p. 1 and p. 24.)

Operation of the death benefit is also detailed in the Prospectus under DEATH BENEFIT:

Basic Death Benefits

The basic Death Benefits depends on the decedent's age on the date of death:

If death occurs during the first ten (10) Annuity Years: The Death Benefit is the greater of:

- The sum of all Purchase Payments less the sum of all withdrawals; and
- The sum of your Account Value in the variable investment options and your Interim Value in the Fixed Allocations.

If death occurs after the tenth (10th) Annuity Year: The Death Benefit is your Account Value.

(Exhibit B at p. 35.)

This same explanation of death benefits is provided in the annuity contract at Page 17 under the Death Benefit section. (Exhibit C at p. 17.)

Plaintiff has not and cannot complain he was unable to find the facts necessary to bring his claims regarding investment risk in the Sub-accounts or operation of the death benefits in the Prudential annuity documents he possessed for nearly 13 years. Nor can he allege any excuse for failure to use reasonable diligence to discover the “true” facts of his annuity sooner. The Complaint and each cause of action should be dismissed without leave to amend as barred by the statute of limitations.

2. Plaintiff's Claims Against Prudential Based in Fraud and Mistake are not Tolled under the Discovery Rule²

Plaintiff's conclusory allegations that the “annuity is a complex instrument. . . beyond [Plaintiff's] understanding at the time of the transaction” (Compl. ¶ 13) is insufficient to satisfy the basic requirements for tolling under the discovery rule and must fail under the heightened pleading requirements of Rule 9(b) for fraud and mistake.

The pleading requirements of Rule 9(b) mandate that Plaintiff must detail his diligent efforts to comply with the applicable limitation period. Where a complaint discloses that a fraud [misrepresentation] or mistake claim [Plaintiff's Sixth, Eighth, Ninth, Tenth and Eleventh Causes of Action] is filed outside of the limitations period, a plaintiff must “affirmatively allege facts in his complaint showing that he was not negligent in failing to make discovery sooner” or “affirmatively establish facts in his complaint that he was not on inquiry notice,” otherwise the complaint is subject to dismissal at the pleading state. *See, Denholm v. Houghton Mifflin Co.*, 912 F.2d 357, 362 (9th Cir. 1990). “Conclusory allegations of fraudulent concealment are not sufficient to withstand a motion to dismiss” when tolling a statute of limitations is at issue. *Moll v. U.S. Life Title Ins. Co.*, 700 F. Supp. 1284, 1289 (S.D.N.Y. 1988) (citing Fed. R. Civ. P. 9(b)); *Guerrero v. Gates*, 442 F.3d 697, 706-07 (9th Cir. 2006) (“Guerrero has failed to plead with particularity any additional fraudulent behavior on the part of the defendants that would excuse his delay in bringing this suit.”) *See also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (when a plaintiff's claims are “grounded in fraud,” the complaint “as a whole must satisfy the heightened pleading requirements of Rule 9(b).”)

Plaintiff's Complaint lacks any of the required particularity for demonstrating conduct on the part of Prudential sufficient to bring his claim of fraud or mistake, much less to excuse his delay in bringing a suit. He has not because he cannot allege that any of the facts necessary to bring his claims on the variable nature of the Sub-accounts or the application of the death benefit were hid from him or otherwise unavailable to him with the exercise of some due diligence. These facts are in black and white in the annuity documents he had at the time of sale in May 2000.

Beyond the Application, annuity contract and Prospectus, Plaintiff received Annuity Transaction Confirmations and Quarterly Statements that showed his account values dipping to nearly half his investment as early as 2001. (*See* Exhibit D.) In 2007, he had rebounded to over \$94,000 (*Id.*) but experienced the losses of 2008 (*Id.*) and did not fully recover before he annuitized in 2010. Also provided in these Statements was the value of the death benefit, which changed over time with withdrawals and then to the account value on the annuity's 10th anniversary. (*Id.*) Not only were all the facts necessary to bring Plaintiff's claims available in 2000, but evidence of the annuity's operation was provided to Plaintiff quarterly for ten years. Plaintiff has not and cannot excuse his delay in bringing suit. Plaintiff's Complaint and each cause of action is barred by the statute of limitations and should be dismissed without leave to amend.

3. Plaintiff Cannot Toll His Claims against Prudential by Alleging Fiduciary Duty

Unable to plead around “inquiry notice,” Plaintiff's Complaint relies instead on claims of a “fiduciary duty” as excusing him from exercising due diligence in bringing his Complaint. (Compl, ¶ 26.) Plaintiff's excuse fails as Prudential has no fiduciary duty to Plaintiff. *Love v. Fire Insurance Exchange*, 221 Cal. App. 3d 1136, 1150 (1991) (court refused to toll the statute of

limitations for the plaintiff where there was no fiduciary duty between plaintiff insured and defendant insurer). Plaintiff waited 13 years to bring his claims - nine years after the longest statutory period. Tolling is unavailable to his claims against Prudential, and each should be dismissed.

Even if Plaintiff's claims were timely, each fails on the face of the Complaint.

B. Plaintiff's Claims for Fraud, Misrepresentation and Violations of the UCL Cannot Be Brought On A Theory Of Vicarious Liability Against Prudential.

Plaintiff's claims arise out of his dissatisfaction with the performance of his annuity, the operation of the death benefit, and, at their core, allegedly negligent and fraudulent advice given to him by Wacik and United Planners. Plaintiff alleges Wacik, "intentionally misrepresented the risks and benefits" of the annuity and "expressed the firm opinion that the annuity was a good investment for [Plaintiff] when in fact it was a bad investment for [Plaintiff]." (Compl. ¶ 77.) The Complaint does not allege that Prudential made any representations to Plaintiff or had any direct interactions with Plaintiff. All of Plaintiff's claims hinge on the agency relationship between Prudential on the one hand and Wacik and United Planners on the other.

While tortious acts of an agent can be imputed to an insurer in certain circumstances, only acts that fall within the scope of the agent's relationship with the insurer will support a claim for vicarious liability. See *Desai v. Farmers Ins. Exch.*, 47 Cal. App. 4th 1110, 1118 (1996) (insurer's liability for an agent's actions only arises if those actions were "committed during the course and scope of the agent's employment."); see also *Schultz Steel Co v. Hartford Accident & Indemnity Co.*, 187 Cal. App. 3d 513, 518 (1986). An agent's actions that fall outside the course and scope of the agency relationship cannot be imputed back to the insurer. *Capitol City Foods, Inc. v. Superior Court*, 5 Cal. App. 4th 1042, 1047-8 (1992) (respondeat superior liability unavailable where agent or employee is acting outside the scope of his or her employment.) Further, it is the terms of the contract that control, rather than any oral representations or agreements. *Tomlinson v. Qualcomm*, 97 Cal. App. 4th 934, 945 (2002).

Wacik was an independent insurance producer and registered investment advisor employed by United Planners. His agency with Prudential is limited to the application and issuance of the Prudential annuity. Wacik has no apparent or ostensible authority to say or make any representations different or contrary to the terms and conditions of the Prudential annuity.

There are no claims that the annuity contract or any of the supporting documents ratified these alleged omissions and misrepresentations. Any oral representations that are inconsistent with the Prudential contracts are outside the scope of the Wacik's agency. Plaintiff's claims are insufficient to sustain a claim for misrepresentation or fraud against Prudential.

Similarly, under California law, "the concept of vicarious liability has no application to actions brought under the UCL. A defendant's liability must be based on his personal participation." *Perfect 10 v. Visa Int'l Serv. Ass'n*, 2004 U.S. Dist. LEXIS 15895, *21 (N.D. Cal. 2004). Here, where each of the allegations is based on Prudential's vicarious liability for the acts of Wacik and United Planners, there is no claim under the UCL.

C. Plaintiff's Claims For Breach Of Fiduciary Duty, Negligence, Violations Of The CLRA Lack Any Valid Legal Theory Against Prudential

The majority of Plaintiff's causes of action lack any cognizable legal theory. Not only are they pled on conclusory and speculative grounds, but the very legal theories they espouse are inapplicable as to Prudential, as an insurer. The Court is "not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2000). Instead, Plaintiff's Complaint must state with specificity the facts upon which his allegations are based. Thus these claims lack a valid legal theory and should be dismissed.

1. There is no cause of action for “Breach of Fiduciary Duty” against an insurer under California law

Plaintiff's First Cause of Action alleges that Plaintiff, “placed his trust and confidence” in all of the named Defendants, and that their “misrepresentation, omissions and fraudulent recommendation” constitute a breach of fiduciary duty. (Compl. ¶ 31.)

There is no “fiduciary duty” between an insurer and an insured. *Love v. Fire Insurance Exchange*, 221 Cal. App. 3d 1136, 1148-49 (1991). Annuities are insurance contracts. Cal. Ins. Code 101 (defining “life insurance” to include annuities.) While there are “special duties” arising out of the insurance contract between the parties, including the implied duties of good faith and fair dealing, they arise “because of the unique nature of the insurance contract, *not* because an insurer *is* a fiduciary.” *Id.* at 1148 (emphasis in original). Where an insured has received the full benefits of the insurance contract at issue, the “fiduciary-like” rights under an insurance contract are not implicated, and therefore there can be no claim for breach of fiduciary duty. *New Plumbing Contractors, Inc. v. Nationwide Mutual Insurance Co.*, 7 Cal. App. 4th 1088, 1096-7 (1992). Rule 12(b)(6) motions to dismiss claims for breach of fiduciary duty against insurers are routinely granted. See, e.g., *General Amer. Life Ins. Co. v. Rana*, 769 F. Supp. 1121, 1126 (N.D. Cal. 1991); *Hassard, Bonnington, Roger & Huber*, 740 F. Supp. at 790, 792; *Almon*, 724 F. Supp. at 766; *Foxfire*, 820 F. Supp. at 498 (granting summary judgment to insurer on breach of fiduciary duty claim, because “as a matter of law, [the insured] cannot maintain an action for breach of fiduciary duty”). Prudential's motion to dismiss Plaintiff's First Cause of Action for Breach of Fiduciary should be sustained without leave to amend.

2. There is no cause of action for Negligence against an insurer under California law

Plaintiffs' Second, Third and Fourth Causes of Action allege that Wacik, during in-person meetings with Plaintiff, “negligently misrepresented the risks and benefits of the transaction.” (Compl. ¶¶ 20-22; 42-44.) There are no allegations that Prudential failed to provide written disclosures or that it misrepresented any of the terms or conditions of the annuity in the Application, annuity policy or Prospectus.

Plaintiff's claims ignore an unbroken, 50-year-long chain of California cases holding that there is no viable claim (by an insured or otherwise) for “negligence” against an insurer. See, e.g., *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 689 (1957) (“negligence alone is insufficient to render the insurer liable.”); *Soto v. Royal Globe Ins. Co.*, 184 Cal. App. 3d 420, 432 (1986) (insurer cannot be sued under “garden variety concepts of negligence”); *Sanchez v. Lindsey Morden Claims Servs.*, 72 Cal. App. 4th 249, 254 (1999) (“negligence is not among the theories of recovery generally available against insurers.”); *Vournas v. Fidelity Nat'l Title Ins. Co.*, 73 Cal. App. 4th 668, 675-676 (1999) (insured has no claim against insurer based on negligence.); *Diamond v. State Farm Mutual Auto Insurance Co.*, 2011 U.S. Dist. LEXIS 50797 (E.D. Cal. 2011) (insured may not proceed on separate causes of action for negligence against insurer.).

Mere allegations that an investment advisor provided unsuitable advice during one-on-one meetings fails to support a claim for negligence against an insurer. Plaintiff is unable to sustain his claims for Professional Negligence of a **Financial** Advisor, Negligent Omissions, and Negligent Misrepresentation against Prudential. Prudential's motion to dismiss Plaintiff's Second, Third and Fourth Causes of Action should be sustained without leave to amend.

3. Plaintiff's CLRA claim must fail as annuities are not “Goods and Services” under the Act

Plaintiff alleges Wacik's advice is a “service” under the CLRA. (Compl. ¶¶ 69-70.) Plaintiff does not allege, and cannot allege, that Prudential gave any investment advice to Plaintiff. Nor is the annuity a “good” or “service” under the CLRA.

The CLRA defines “goods” as “tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not severable from the real property.” Civil Code, § 1761(a). It defines “services” as “work, labor, and services for other than a commercial or business use, including

services furnished in connection with the sale or repair of goods.” *Id.*, § 1761(b). It is settled law that a life insurance policy is not a “good” or “service” under the CLRA. *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 61 (2009); *Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal. 3d 362, 376 (1978) (“insurance is technically neither a ‘good’ nor a ‘service’ within the meaning of the [CLRA].”); *Estate of Migliaccio*, 436 F. Supp. 2d 1095, 1108–09 (C.D. Cal. 2006) (holding that annuities, included within the Insurance Code definition of life insurance, are neither goods nor services under the CLRA); *Moroney v. Am. Int’l Group (In re Bacon)*, 415 F. Supp. 2d 1027, 1037 (N.D. Cal. 2006) (annuities are neither goods nor services within the meaning of the CLRA). Prudential’s annuity does not fall within the definition of “goods or services” and is not subject to the CLRA.

Nor is there legal authority supporting the theory that “investment services fall within the purview of the CLRA.” *Sanchez v. Aviva Life & Annuity Co.*, 2010 U.S. Dist. LEXIS 64264 *18-19 (E.D. Cal. 2010) (finding that there is no case law supporting the theory that investment advice or investment services are a “good or service” under the CLRA.) Even if Plaintiff could claim that Prudential was liable for the “investment advice” of Wacik and United Planners, which it is not, such advice is not a “service” under the Act. Plaintiffs’ Ninth Cause of Action fails to state a claim for which relief can be granted.

D. Plaintiff’s Claims For Common Count, Rescission, Tort Of Another And Financial Elder Abuse Are Not Separate Causes Of Action But Instead Are Remedies Unsupported By Plaintiff’s Tort Claims

Plaintiff’s Fifth, Sixth, Eighth and Tenth Causes of Action improperly attempt to create separate causes of action for remedies. A request for a specific remedy is not sufficient to state a claim upon which relief can be granted under Rule 12(b)(6). *Jensen v. Quality Loan Service Corp.*, 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010). This includes rescission, damages, and certain remedies under contract law. *Silver State Broadcasting, LLC v. Beasley FM Acquisition Corp.*, 2012 U.S. Dist. LEXIS 129614 *7 (D. Nv. 2012). Plaintiff cannot create a cause of action from these remedies nor does he present any cognizable tort action to support his claims for these damages.

1. California law does not recognize a separate cause of action for Common Count - Money Had And Received; nor does Plaintiff allege a cause of action to support money had as a measure of damages where there is no debt owed Plaintiff by Prudential

Plaintiff’s Fifth Cause of Action alleges only that the Defendants “took money” entrusted to it by Plaintiff which “should be returned.” (Compl. ¶ 54.) Money had and received is not considered a separate cause of action under California law. *McBride v. Boughton*, 123 Cal. App. 4th 379, 394 (2004) (“a common count is not a separate cause of action” and instead, where pled “as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.”)

A claim “for money had and received” is stated if it is alleged the defendant “is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff.” *Farmers Ins. Exchange v. Zerlin*, 53 Cal. App. 4th 445, 460 (1997).

Plaintiff has not alleged a *debt owing* between himself and Prudential. Plaintiff paid money to Prudential and received an annuity, which matured 10 years later. (Compl. ¶ 16.) Plaintiff annuitized the contract and began taking monthly annuity payments in August 2010, to the present. (Compl. ¶ 17.) Plaintiff’s claim for the “common count” is based on the same facts and seeks the same recovery as in his causes of action for rescission, fraud, and negligence. Those causes of action are subject to dismissal for the reasons stated herein; his alternative pleading for “common count” should be dismissed on the same grounds.

2. California law does not recognize a separate cause of action for rescission; nor does plaintiff allege a cause of action to support rescission as a measure of damages after electing to receive the annuity benefits

The Sixth Cause of Action for Rescission of Contract Due to Fraud or Mistake alleges Plaintiff was fraudulently induced to enter into the annuity because he was “mistaken” about the nature of the contract; and that the contract should be rescinded “together with restitution and damages.” (Compl. ¶¶ 57-59.)

“Rescission is a remedy, not a cause of action.” *Ozuna v. Home Capital Funding*, 2009 U.S. Dist. LEXIS 111652, (S.D. Cal. 2009). A cause of action for “rescission” fails to state a claim for which relief can be granted, and dismissal is warranted under [Rule 12\(b\)\(6\)](#). *Id.*, citing *Nakash v. Superior Court*, 196 Cal. App. 3d 59, (1987) (“rescission is *not* a cause of action; it is a remedy.”)

Further, a party to a contract can seek rescission where consent, “was given by mistake, or obtained through duress, menace, fraud, or undue influence.” [Cal. Civil Code 1689](#). However, if a defrauded party claims that he is “induced by false representations to execute a contract, the party has the option of rescinding the contract *or* affirming it and recovering damages for the fraud.” *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1153 (Cal. App. 2d Dist. 2005); *Village Northridge Homeowners Association v. State Farm Fire & Casualty Co.*, 50 Cal. 4th 913, 927-929 (2010)(a party induced by fraud is required to either rescind the contract or to affirm and sue for damages on fraud); *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.*, 121 Cal. App. 3d 447, 461 (Cal. App. 3d Dist. 1981)(where there is fraud in the inducement, it is “well established” the plaintiff “may elect either the contract remedy, consisting of restitution based on rescission or the tort remedy, by affirming the contract and seeking damages”).

Plaintiff has affirmed the contract by receiving the benefits in the form of three years of annuity payments. Plaintiff cannot seek to rescind the contract *and* sue for damages. Plaintiff made his election. Plaintiff's claim for the remedy of rescission should be dismissed.

3. California law does not recognize a separate cause of action for Tort of Another; nor does Plaintiff allege a cause of action to support attorney's fees as damages where Prudential's conduct did not require Plaintiff to bring suit against Wacik and United Planners to protect his interests

Plaintiff states that the allegations pled in the Complaint for fraudulent misrepresentation, negligent omissions and fraud give rise to a claim for attorney's fees under the “tort of another” doctrine. (Compl. ¶¶ 57-59.) Plaintiff avers the “wrongful actions” of each of the Defendants caused Plaintiff to file and prosecute this lawsuit against each Defendant, thereby entitling him to recover attorneys fees under the Prentice exception.

Plaintiff's claim for attorneys fees is claim for damages, rather than a claim for which relief can be granted under [Rule 12\(b\)\(6\)](#) and on that basis should be dismissed. *David v. Hermann*, 129 Cal. App. 4th 672, 687 (2005)(attorney's fees are an element of damages). The “tort of another” doctrine is “not a claim for relief, but merely a theory of tort damages” *Santa Clara Valley Water District v. Olin Corp.*, 2007 U.S. Dist LEXIS 76117 *7-8 (N.D. Cal. 2007). Further, Plaintiff is mistaken about the application of this common law exception as to Prudential.

The general rule in California requires, “each party to pay his own attorney's fees in the absence of a contrary statute or contract.” [Cal. Code Civ. Proc. 1021](#). An exception has been carved out in the case law where the actions of one tortfeasor makes it necessary for a plaintiff to bring a lawsuit against a separate third party, the so-called Prentice exception.

In *Prentice*, the escrow holder was negligent in closing the sale of a property and as a result the sellers were forced to bring a quiet title action against the purchaser. Prentice secured a judgment of damages against the escrow holder for the cost of the quiet title action and his attorney's fees in bringing suit against the purchaser. The Prentice exception “was not meant to apply in every case in which one party's wrongdoing causes another to be involved in litigation with a third party. If applied so broadly, the judicial exception would eventually swallow the legislative rule that each party must pay for its own attorney. *David v. Hermann*, *supra*, at 688-689 (2005). To avoid that result, the exception is limited “to cases involving exceptional circumstances,” where the defendant's tortious conduct has made it *necessary* for a plaintiff to incur legal expenses to protect his

interests. *Id.*, citing *Prentice v. North Amer. Title Guar. Corp.*, 59 Cal. 2d 618, 620 (1963). Failure to demonstrate a traditional tort duty and allege some wrong committed that resulted in third party legal expenses will lead to dismissal. *Id.*, citing *Sooy v. Peter*, 220 Cal. App. 3d. 1305, 130-9-10 (1990).

Plaintiff does not and cannot allege that Prudential's actions required him to bring suit against Wacik and United Planners to protect his interests. The Prentice exception is not a separate cause of action and is inapplicable to Prudential.

4. California Law Does Not Recognize A Separate Cause of Action For Financial Elder Abuse; Nor Does Plaintiff Allege A Cause of Action To Support Special Damages Against Prudential

Plaintiffs' Tenth Cause of Action is for “financial elder abuse” under Welfare & Institutions Code section 16510.30. California courts have held that this Section does not create a new tort or independent theory of liability under which plaintiffs may recover damages. *Berkley v. Dowds*, 152 Cal. App. 4th 518, 529 (2007)³ (“[t]he Act does not create a cause of action as such, but provides for [special damages including] attorney fees, costs and putative damages”), citing *ARA Living Centers-Pacific, Inc. v. Superior Court*, 18 Cal. App.4th 1556, 1563-1564 (1993); see *Welf. & Inst.Code*, § 15657). Financial abuse of an elder, if proved, entitles a litigant to recover additional or enhance remedies under section 15657.5(a). *Id.* Plaintiff's claim for financial elder abuse must fail, as there is no such separate cause of action.

Moreover, Plaintiff cannot seek special damages (attorneys fees and treble damages) through vicarious liability. These damages are intended to deter and punish and are not vicarious as discussed below. Prudential's motion to dismiss Plaintiff's Tenth Cause of Action should be sustained.

E. Plaintiff Cannot Seek Treble Damages Or Punitive Damages Based On Vicarious Liability

Plaintiff fails to state a claim for punitive damages and treble damages under the Elder Abuse Act against Prudential as Wacik is *not* an employee of Prudential and exemplary damages cannot be assessed on a vicarious liability theory.

Employers may be subject to punitive damages for the actions of their employees, “punitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” *College Hosp., Inc.*, 8 Cal. 4th at 724 fn. 11 (1994); see also *In re Related Asbestos Cases*, 566 F. Supp. 818, 821 (N.D. Cal. 1982) (under California law, “punitive damage liability is not imposed on the basis of vicarious fault”). For punitive damages to be assessed on a theory of vicarious liability, the “agent” must be an employee with sufficient status to make actions that would affect company policy, hired by the employer who had knowledge of that employee's abuse raised by Plaintiff, these inapposite cases address actual physical abuse of an elder by health care providers providing for the special circumstances. unfitness, and ratified or authorized the subsequent wrongful acts. *Id.*; see also, *Barton v. Alexander Hamilton Life Insurance Co. of America*, 110 Cal. App. 4th 1640, 1644 (2003) (employee must be a “director or managing agent”). Plaintiff is unable to meet *any* of these requirements. First and foremost, *Plaintiff has not and cannot allege that Wacik was an employee of Prudential.*

As noted above, the “financial elder abuse” claim pled by Plaintiff is a vehicle for obtaining special damages if certain conduct is proven. To that end, the law regarding the availability of punitive damages in a vicarious liability claim applies to any special or treble damages that Plaintiff seeks pursuant under the Elder Abuse Act. Such damages are intended to deter and punish, making them “punitive damages.” See *Clark v. Superior Court*, 50 Cal. 4th 605, 613-614 (2010) (treble damages for elder abuse are intended to punish and deter, and are therefore considered to be in the nature of punitive damages.) The treble damages and attorneys fees sought under the Act, which are intended to be punitive, cannot be assessed against Prudential where no independent acts are alleged against Prudential; nor can Prudential be vicarious liable where Wacik is not an employee. Prudential's motion to dismiss the claims for punitive and treble damages should be granted.

CONCLUSION

Plaintiff's Complaint is time barred. Plaintiff's claims even if timely fail to state a cause of action against Prudential. Prudential's motion to dismiss each claim should be sustained. Further, the law does not support a claim for punitive damages against Prudential based on vicarious liability, and Prudential respectfully requests that this Court grant its motion to dismiss all of the punitive and treble damages claims against Prudential.

Respectfully submitted,

Dated: November 8, 2013

DENTONS US LLP

By: /s Laura Geist

LAURA GEIST

Attorneys for Defendant

PRUDENTIAL ANNUITIES LIFE ASSURANCE
CORPORATION

Footnotes

- 1 Back to the Future. Robert Zenkers. Universal City Studios, Inc., 1985. Film.
- 2 The discovery rule does not apply to Plaintiff's UCL claim.
"An action for unfair competition under [Business and Professions Code section 17200](#) 'shall be commenced within four years after the cause of action accrued.' ([Bus. & Prof. Code, Section 17208](#).) the 'discovery rule,' which delays accrual of certain causes of action until the plaintiff has actual or constructive knowledge of facts giving rise to the claim, does not apply to unfair competition actions." [Snapp & Assocs. Ins. Servs. v. Robertson](#), 96 Cal.App. 4th 884, 891 (2002). Plaintiff's claim under the UCL ran on May 2, 2004 and must be dismissed without leave to amend.
- 3 While some courts hold that there *may* be a separate cause of action for **financial elder abuse**, the better reasoned cases hold the statutes provide only for enhanced damages and are not independent causes of action. *See, e.g., Smith v. Ben Bennett, Inc.*, 133 Cal. App. 4th 1507, 1525 (an **elder abuse** claim *could* be a cause of action for some purposes but not others); [Perlin v. Fountain View Management, Inc.](#), 163 Cal. App. 4th 657, 666 (2008) (finding that the **Elder Abuse** Act creates an "independent cause of action"). In contrast with the claim for **financial elder**

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